IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 56695-4-I
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
	)	
TROY HARRISON,	)	
Appellant.	)	
	)	FILED: **September 25, 2006**
	)	

PER CURIAM – A jury convicted Troy Harrison of robbery in the first degree charged in the alternative as armed with a deadly weapon or inflicting bodily injury. We conclude sufficient evidence supports the jury's verdict, but we accept the State's concession that the deadly weapon enhancement instruction was erroneous and not harmless. We affirm Harrison's conviction but remand for resentencing.

FACTS

On January 14, 2005, Susan Goodenough and Steven Ayres were working as loss prevention officers at the Fairwood Plaza Safeway in Renton. Goodenough and Ayres testified that they saw Harrison acting suspiciously in the cough medicine aisle. Goodenough observed Harrison – who had red hair, a hat, glasses, and a jacket –

pick up boxes of medicine, study the labels, look around, and return some of the boxes to the shelves. Goodenough testified she saw Harrison put "at least four" boxes in his "jacket pocket one by one." She watched Harrison leave the store without paying.

Outside the Safeway, Goodenough and Ayres approached Harrison and identified themselves as loss prevention officers. Goodenough testified that as soon as she said "store security," Harrison "tried to push me aside to get through the doors to exit the store." Goodenough testified that she and Ayres then "grabbed [Harrison's] jacket to try to detain him back into the store, and at that point he struggled with us quite a bit." Goodenough said she grabbed the side of Harrison's jacket, with her right hand underneath his body, and Ayres grabbed the back of the jacket. During the struggle, Harrison ended up on the ground and his jacket came off almost entirely, except for one hand, which remained in the jacket sleeve. Goodenough said that as the jacket came off, she saw that two "boxes of cold medicine had fallen out." After these boxes fell out, she could still feel boxes inside the jacket.

Goodenough testified that when Harrison was on the ground, "he had reached into his pocket and pulled out a knife." She said she saw the knife "after I felt it pierce my skin," cutting her right hand and drawing blood. She described feeling "something real sharp cut my hand." At that point she backed off and saw the knife. Goodenough testified that when she backed up, the knife "had closed up and he was trying to open it with his mouth, with his teeth." Goodenough yelled knife and she and Ayres backed away. At the same time, Harrison lunged at the officers and yelled "get the F away."

As Harrison ran away, Goodenough said she "could hear when he ran off, I could hear [medicine boxes] rattling away."

After Goodenough and Ayres each independently identified Harrison, the police arrested Harrison at his residence. The police found a pocket knife with a lock blade matching Ayres's description of the one used during the incident. The knife's blade measured three inches. Ayres later identified the knife from a photo. The State charged Harrison with committing robbery in the first degree in the alternative under armed with a deadly weapon or infliction of bodily injury. The State also charged Harrison with a deadly weapon enhancement.

At trial, the State argued that Harrison used force to retain the stolen property and that he was armed with a deadly weapon and inflicted bodily injury. Harrison's theory was that he did not use force to obtain the cough medicine, and that any force he used occurred after he obtained the medicine and it fell out of his jacket. The defense also claimed Harrison's knife was not a deadly weapon under the circumstances. The jury convicted Harrison of robbery in the first degree as charged and returned a special verdict that Harrison was armed with a deadly weapon at the time of the crime. The court imposed a standard range sentence of 130 months plus 24 months for the deadly weapon enhancement.[1]

ANALYSIS

Sufficiency of Evidence

Harrison contends there was insufficient evidence to support a conviction of

[1] Harrison's offender score is 11.

first degree robbery and his right to a unanimous jury verdict was violated. He also asserts the deadly weapon enhancement instruction was erroneous and the 24-month enhancement must be stricken.

When reviewing sufficiency of the evidence claims, this court considers whether, "after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*" State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)).[2] "A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any inferences reasonably drawn." State v. Bland, 71 Wn. App. 345, 359, 860 P.2d 1046 (1993). Further, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as probative as direct evidence. State v. Vermillion, 66 Wn. App. 332, 342, 832 P.2d 95 (1992).

A person commits robbery when "he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." RCW 9A.56.190. And, under

[2] The State has the initial burden of proving each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 264, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

RCW 9A.56.200, a person commits robbery in the first degree when:

> "(a) In the commission of a robbery or of immediate flight therefrom, he or she:
> (i) Is armed with a deadly weapon; or…
> (iii) Inflicts bodily injury…."[3]

Under Washington's "transactional view" of robbery, the force used after the taking is legally complete and in order to retain the property or to prevent or overcome resistance to the taking is sufficient for purposes of robbery. RCW 9A.56.190; State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992) (holding "force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably . . .is robbery."); see also State v. Manchester, 57 Wn. App. 765, 769-770, 790 P.2d 217 (1990).[4]

At trial, the State had the burden of proving beyond a reasonable doubt that (1) Harrison unlawfully took personal property in the presence of another, (2) the taking was against the person's will by Harrison's use or threatened use of immediate force, violence or fear of injury to that person, (3) Harrison used force or fear to retain possession of the property or to prevent or overcome resistance to the taking, and (4) in the commission of these acts or in immediate flight therefrom Harrison was armed with a deadly weapon or inflicted bodily injury.

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[3] The jury was instructed, "[a] person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon or inflicts bodily injury."

[4] Instruction No. 13 provided, "[t]he crime of robbery does not require that the initial acquisition of the property is forceful. Rather, the retention of the property, via force against the property owner, is robbery."

Relying on State v. Johnson, 155 Wn.2d 609, 121 P.3d 91 (2005), Harrison contends the State did not present sufficient evidence to support a conviction of first degree robbery because (1) the property was peacefully obtained, (2) Harrison abandoned the property before injury or threat of force occurred, and (3) Harrison was not armed with a deadly weapon[5] and did not cause injury at the time of the robbery.

In Johnson, the defendant took a TV without paying. 155 Wn.2d at 610. When two security guards confronted him in the parking lot, he "abandoned the shopping cart" with the TV in it and started to run away. Id. But, after turning back, Johnson punched one of the guards. Id. The Supreme Court held that where a defendant uses force only after abandoning unlawfully taken property, the defendant has not committed first degree robbery. Id. at 610-611. The Court reasoned once the defendant abandons peaceably obtained property, the robbery ends because the force is not used to retain the property or to prevent or overcome resistance to the taking. Id. at 610-611.

Johnson is distinguishable. Here, unlike in Johnson, there was sufficient evidence for any rational trier of fact to find Harrison did not abandon[6] the stolen property but rather used force or threat of injury to retain it. Goodenough and Ayres testified they tried to detain Harrison by holding his jacket and that only after they grabbed the jacket did medicine fall out. Both also testified Harrison used physical

[5] Harrison also argues he did not display what appeared to be a deadly weapon at the time of the robbery. However, the State did not charge first degree robbery based on display of a deadly weapon. See RCW 9A.56.200(1)(a)(ii).

[6] "An intention to abandon is ordinarily an essential element of an abandonment." Turner v. Gilmore, 50 Wn.2d 829, 831, 314 P.2d 658 (1957).

force to keep one hand in the jacket. Goodenough testified Harrison struggled to maintain possession of the jacket with the cold medicine in it. In addition, she testified she could see two of the four medicine boxes fall out, could feel boxes of medicine in his jacket, and could hear a rattling sound as he ran off with his jacket. When Harrison fled, he still possessed at least two medicine boxes. Viewing the facts in the light most favorable to the State, any rational trier of fact could find Harrison did not abandon the stolen property, that he used force to retain the stolen medicine, and that he retained at least two boxes.[7]

There is also sufficient evidence that Harrison was armed with a deadly weapon at the time of the crime. It is undisputed that Harrison's knife has a blade three inches long. Knives with blades longer than three inches are per se deadly weapons, but "whether a knife with a blade less than 3 inches is a *deadly* weapon is a question of fact." State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (emphasis in original) (concluding there was sufficient evidence for a jury to conclude a pen-knife with a 1.5 inch blade was a deadly weapon).

Washington courts recognize two categories of deadly weapons: (1) "any explosive or loaded or unloaded firearm," and (2) a weapon that, "under the

[7] Harrison argues because Goodenough did not see the remaining medicine boxes in his jacket, and because the police did not find any medicine in his residence upon arrest, six days later, he did not retain any property. He appears to argue these facts mean he could not have used force to retain possession of the property and therefore did not commit robbery. But, Goodenough testified she saw him take four boxes from the medicine aisle and at most, two boxes fell out. And, the robbery statute's plain language does not require actual retention. It only requires "force or fear must be used to obtain or retain possession." RCW 9A.56.190. Harrison cites no authority establishing property must be retained in fact to establish force was used to retain possession of it. Finally, even if Goodenough only felt and heard the medicine boxes, circumstantial evidence is equally probative as direct evidence, and the jury is entitled to believe her testimony and to draw reasonable inferences accordingly. See Vermillion, 66 Wn. App. at 342.

circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6); see also State v. Holmes, 106 Wn. App. 775, 781, 24 P.3d 1118 (2001).[8] The latter category is analyzed by "looking to the circumstances in which the object is used, including 'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" Holmes, 106 Wn. App. at 781-782.[9]

Relying on Shilling and Holmes, Harrison argues the knife is not a deadly weapon because medicine boxes fell out of his jacket before he took the knife out, the knife never opened, and Goodenough's cut was minor. He also argues he did not inflict bodily injury.

In Shilling, we held there was sufficient evidence to support the determination that a drinking glass was a deadly weapon where testimony indicated drinking glass has the inherent capacity to cause bodily injury; the defendant hit the victim in the head with the glass, causing lacerations requiring stitches, and embedding glass in the victim's head; and expert testimony established glass could require stitches and permanent scarring. 77 Wn. App. at 172. In Holmes, the court held there was sufficient evidence to support a first degree robbery conviction where the defendant

[8] Instruction No. 11 defined a "deadly weapon" as "any weapon, device, instrument, substance or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury."

[9] "Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm." State v. Shilling, 77 Wn. App. 166, 172, 889 P.2d 948 (1995). And, substantial bodily harm means "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

waved a utility knife with the blade extended at the store manager, causing the manager to step back; the defendant told the manager "come get me" or "try and stop me;" the manager felt threatened the defendant would cut him; and testimony indicated the dangerousness of utility knives. 106 Wn. App. at 781-782.

As in Holmes, there was sufficient evidence for a rational trier of fact to find Harrison used a deadly weapon to retain the stolen property. The State presented testimony that Harrison opened the knife to forcibly retain the cold medicine: Goodenough testified that as she and Ayres attempted to detain Harrison by grabbing his jacket, he reached into his pocket and pulled out a knife; Goodenough and Ayres felt threatened by Harrison's use of the knife, causing them to back away from him; Harrison made threatening comments to Goodenough and Ayres while holding the knife. Goodenough said she saw the knife "cropped open" after she felt it pierce her right ring finger and before it "close[d] back up." Both Goodenough and Ayres testified Harrison tried to open the knife with his mouth and teeth because his other hand was still stuck in the jacket. Goodenough testified when she saw Harrison holding the folding pocket knife, she backed up and yelled knife. Harrison also lunged and yelled "get the F away."

Ayres testified that after they grabbed his coat, Harrison tried to get away with the jacket and "came up with [the knife] in his mouth, and he slipped it open, yanked it like this, and then that's when we just backed off."[10] Ayres described the knife as a "single blade, flip-out knife, locked." Ayres testified that though "I didn't feel like he

[10] The record is unclear on the precise order of events involving the knife.

was going to run at me and stab me," he felt threatened because, "[t]here is a knife." He also said he backed up when Goodenough yelled knife.

As part of the State's evidence, the video of the confrontation with Harrison was admitted into evidence. The video showed Harrison struggling with Goodenough and Ayres, trying to open his knife with his mouth, holding his knife while lunging toward them, and running off with his jacket and knife. Viewed in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Harrison was armed with a weapon readily capable of causing death or substantial bodily harm at the time of the robbery.

And, while Harrison's knife only cut Goodenough's right ring finger, drawing blood but not requiring stitches or hospitalization, the severity of Goodenough's injury is not dispositive. RCW 9A.04.110(4)(a) defines "bodily injury" as "physical pain or injury, illness, or an impairment of physical condition."[11] Washington courts have not interpreted the statutory definition of deadly weapon to require proof of actual infliction of substantial bodily injury. See Holmes, 106 Wn. App. at 782 (determining utility knife was a deadly weapon despite fact no injury occurred). Instead, the proper inquiry is whether the evidence supports the conclusion that the weapon, "under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Because the robbery had not ended when medicine fell out of the jacket and Goodenough was cut, there was sufficient evidence from which any rational trier of

[11] Instruction No. 12 provided, "Bodily injury, physical injury, or bodily harm means physical pain or injury, illness, or an impairment of physical condition."

fact could find Harrison inflicted bodily injury during the commission of the robbery or in immediate flight therefrom.

We conclude sufficient evidence supports the jury's conviction of first degree robbery based on armed with a deadly weapon and infliction of bodily injury beyond a reasonable doubt and Harrison's right to due process was not violated.

Deadly Weapon Enhancement

Harrison asserts the 24-month deadly weapon enhancement must be stricken because the special verdict jury instruction was erroneous and not harmless. The State concedes error and that the error was not harmless. We accept the State's concession.

We affirm the conviction and remand for resentencing.

FOR THE COURT: